Editor's note: Appealed -- stipulated dismissal, Civ. No. LV-2029-RDF (D.Nev. Feb. 12, 1974)

UNITED STATES
v.
THE DREDGE CORPORATION

IBLA 71-227 Decided August 25, 1972

Appeal from decision (Nevada Contest No. N-2768) of Hearing Examiner declaring the Dredge No. 51 sand and gravel placer mining claim null and void.

Affirmed.

Mining Claims: Common Varieties of Minerals: Generally -- Mining Claims: Discovery: Marketability

To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit as of that date. Where the evidence shows that there is an abundant supply of similar sand and gravel in the area of the claim, that sand and gravel was being produced and sold in the area on July 23, 1955, but that no sand and gravel had been or was being marketed from the claim as of that date, the fact that the material on the claim is similar both as to quantity and quality with the abundant supply of similar material found in the area is insufficient to show that material from this particular claim could have been profitably removed and marketed on or before July 23, 1955, and the claim is properly declared null and void.

Mining Claims: Discovery: Marketability -- Mining Claims: Location

To hold that a mining claim located for a common variety of sand and gravel prior to July 23, 1955, must be perfected by a discovery (including marketability) made before that date is not to give retrospective application to the Act of July 23, 1955, which bars locations thereafter made for common varieties of sand and gravel.

APPEARANCES: George W. Nilsson, Monta W. Shirley, of Counsel, for the Appellant; Otto Aho, Field Solicitor, U.S. Department of Interior, for the United States.

OPINION BY MR. HENRIQUES

This is an appeal from a decision of a hearing examiner dated February 19, 1971, holding the Dredge No. 51 sand and gravel placer mining claim embracing 40 acres described as the SW 1/4 SW 1/4 Sec. 11, T. 21 S., R. 60 E., M.D.M., Clark County, Nevada, to be null and void for lack of a timely discovery of a valuable mineral deposit.

The Dredge No. 51 placer mining claim was located on July 21, 1952, for 160 acres described as the SW 1/4 sec. 11, T. 21 S., R. 60 E., M.D.M., Clark County, Nevada. By decision, The Dredge Corporation, 64 I.D. 368 (1957), the Department held that the Dredge No. 51 claim, was invalid as to N 1/2 SW 1/4, SE 1/4 SW 1/4 sec. 11, because those lands were leased under the Small Tract Act, 43 U.S.C. § 682a (1970), when the claim was located. The Department's decision was affirmed in Dredge Corporation v. Penny, 362 F.2d 889 (9th Cir. 1966). The SW 1/4 SW 1/4 sec. 11 was neither leased nor classified for small tract purposes on July 21, 1952, so therefore it was open to mining location when the Dredge No. 51 claim was located.

The land office manager, Bureau of Land Management [BLM], issued a contest complaint against the Dredge No. 51 claim (SW 1/4 SW 1/4 Sec. 11) on June 27, 1958, charging (1) Minerals had not been found within the limits of the claim in sufficient quantities and/or qualities to constitute a valid discovery, and (2) No discovery of a valuable mineral had been made within the limits of the claim because the mineral materials present could not be marketed at a profit prior to the Act of July 23, 1955. On December 4, 1958, the State Supervisor, BLM, filed a motion to dismiss the complaint which the hearing examiner granted on December 8, 1958. Subsequently, there was published in the Federal Register, Document 59-3643 dated April 16, 1959, and filed April 29, 1959, entitled "Classification 95 Nevada-Small Tract Classification; Amendment," which stated in part --

> 1. Effective April 16, Federal Register Document 53-8583 appearing on pages 6413-14 of the issue for October 8, 1953, is revoked as to the following described public lands:
>
> Mount Diablo Meridian, Nevada T. 21 S., R. 60 E., Sec. 11 SW 1/4 SW 1/4 * * *
>
> * * *
>
> 3. The land has been determined to be appropriated under the United States mining laws by virtue

of valid mining claims having been located on the land prior to Small Tract Classification.

E.J. Palmer
State Supervisor

Under date of September 29, 1966, the BLM land office manager issued a second contest-complaint with respect to Dredge No. 51 claim in SW 1/4 SW 1/4 sec. 11, T. 21 S., R. 60 E., alleging the same charges set forth in the first contest-complaint referred to, supra.

No mineral patent application had been filed for the said Dredge No. 51 claim.

Following denial of the allegations, a hearing was held on September 30, 1969, at Las Vegas. After hearing testimony and taking evidence, the hearing examiner held the claim to be null and void for the lack of a timely discovery of a valuable mineral deposit. This appeal followed.

The appellant asserts the second contest should be dismissed because the question of validity of the mining claim was determined in the first contest. The appellant further asserts that the decision should be reversed because the land is mineral in character.

Several arguments are presented in support of appellant's contentions of error. These are summarized as follows:

1. The decision is erroneous because the territory covered by Dredge No. 51 placer mining claim was declared to be mineral and the claim declared to be valid by a decision of the Bureau of Land Management, published in the Federal Register on April 16, 1959.

2. The decision is illegal and unconstitutional because it enumerates a requirement to constitute discovery, in addition to the requirements provided by the Mining Laws, namely, "marketability at a profit."

3. The decision is not supported by the evidence and is contrary to findings of the Department of the Interior deciding that the claim was valid.

4. The decision is contrary to the mining laws of the United States, the Administrative Procedure Act and other applicable laws.

5. The decision is not supported by the weight of the evidence.

It has been consistently held that the power of the Department of the Interior to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title to the lands embraced within the claim has passed from the Government. Cameron v. United States, 252 U.S. 450, 460-461 (1920); Union Oil Company of California v. Udall, 289 F.2d 790, 792 (D.C. Cir. 1961).

Although a mining claim on public land cannot be struck down arbitrarily, the Government has the power, so long as it holds legal title to the land and after proper notice and upon adequate hearing, to determine whether the land is mineral in character and the claim valid, and if the land is found to be nonmineral in character, or the claim invalid, to declare it null and void. See Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963); Standard Oil Co. of California et al. v. United States, 107 F.2d 402, (9th Cir. 1939), cert. denied, 309 U.S. 654 (1940).

The appellant's assertion that the second contest should be dismissed because the question of validity of the mining claim was determined in the first contest is without foundation particularly since the first contest was dismissed without a hearing on the merits. Since title had not passed from the Government to the appellant, we find that the Department acted within the power and authority conferred upon it in inquiring into and determining the mineral character and the validity of the Dredge No. 51 placer mining claim.

For a mining claim to be valid there must be a valuable mineral deposit shown to exist within the limits of the claim.

A discovery exists

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine . . . Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968).

This test, the "prudent man rule", has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit, the so-called "marketability test." United States v. Coleman, supra. This marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand. The marketability test has been specifically held to be applicable in determining the validity of sand and gravel claims in the Las Vegas area. Palmer v. Dredge Corporation, 398 F.2d 791, (9th Cir. 1968),

cert. denied, 393 U.S. 1066 (1969); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); Osborne v. Hammit, Civil No. 414, D. Nev. (August 19, 1964).

A succinct discussion on marketability in relation to sand and gravel mining claims was given recently by the Court in Verrue v. United States, 457 F. 2d 1202 (9th Cir. 1972):

> The criteria of marketability for sand and gravel claims was clearly announced in Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959) wherein the court stated:
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> > * * * "a mineral locator or applicant, to justify his possession, must show that by reason of accessibility bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit".
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> The most recent and authoritative enunciation of this rule is found in United States v. Coleman, 390 U.S. 599, 88 S.Ct. 1327 (1968) and in Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971). In Barrows, the court analyzed the development of the marketability and prudent-man tests and determined at p. 82, in regard to the "prudent-man test", that:
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> > Actual successful exploitation of a mining claim is not required to satisfy the "prudent-man test". [citing Coleman, supra]
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> and at p. 83, in regard to the "marketability test" that:
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> > The "marketability test" requires claimed materials to possess value as of the time of their discovery. Locations based on speculation that there may at some future date be a market for the discovered material cannot be sustained. What is required is that there be, at the time of discovery, a market for the discovered material that is sufficiently profitable to attract the efforts of a person of ordinary prudence. [emphasis in original] 457 F.2d at 1203.

Furthermore, since Congress withdrew common varieties of sand and gravel from location under the mining laws by the Act of July 23, 1955, 30 U.S.C. § 611 (1970), it is incumbent upon one who located a claim prior to that date for a common variety of sand and gravel to show that all the requirements for a discovery, including a showing that the materials could have been extracted, removed, and marketed at a profit had been met by that date. Palmer v. Dredge Corporation, supra; Barrows v. Hickel, 447 F. 2d 80 (1971).

There is no contention that the claim has an uncommon variety of sand and gravel and it appears that it is a common variety. We therefore turn to a consideration of the evidence bearing on the timely discovery of a valuable mineral deposit on the claim by July 23, 1955.

At the hearing, Thomas Schessler, a mining engineer, employed by the Bureau of Land Management, testified as an expert witness for the Government. He stated that the contested claim geographically was 4 miles west of the Las Vegas Strip and approximately 5 miles from the center of town, the center being Fremont and Main Streets. He declared from his study of aerial photographs of the area (Exh. 1-4) that nothing had been removed from the claim nor could any workings be identified on the claim prior to February 28, 1956. (Evidence was also submitted to the effect that an examination was made of the subject land by a representative of the Bureau of Land Management on May 21, 1958, and no improvements were then found during the examination). Schessler further testified that there was loose sand and gravel on the surface to a depth of approximately 3 feet, below which was a "caliche" layer approximately 5 feet thick. He estimated that the amount of sand and gravel above the caliche on the 40 acres involved was in the neighborhood of 60,000 cubic yards. He stated that approximately 33,900 yards of sand and gravel had been removed from the claim as of September 19, 1969. He indicated that the caliche conglomerate was not competitive in today's market. By geological inference he indicated that there might be approximately 200 feet of usable sand and gravel beneath the "caliche" layer. He stated that the Wells Cargo pit, (1/4 mile away from the contested claim) on a patented placer mining claim, contained some "caliche" which had been mined by blasting. The Wells Cargo pit, at the time of the hearing, had been mined to a depth of approximately 60 feet and it had been drilled 100 feet deeper.

Messrs. E. J. Mayhew and Robert McMillan, geological engineers, testified as expert witnesses for the appellants. They indicated that the "caliche" contained on the Dredge No. 51, claim could easily

be mined, processed and sold at a profit just as Wells Cargo could mine and sell at a profit. They estimated, through geological inference, that there was between 200 to 1000 feet of usable sand and gravel beneath the "caliche".

The facts of this case are generally undisputed. The claim had a relatively shallow surface covering of a common variety type sand and gravel which type material has widespread distribution throughout the Las Vegas Valley and which is somewhat similar in its nature to deposits which are being worked commercially in the Las Vegas area. Below the surface covering is a bed of dense "caliche" 5 or more feet thick.

Examining the record we find that prior to May 21, 1958, there was no evidence or indication of any development, commercially or otherwise, and there was no evidence that anything had ever been marketed from the claim prior to that date. Extraction of sand and gravel after 1964 is not sufficient to show that material from this particular claim could have been profitably removed and marketed on July 23, 1955.

Obviously the evidence supplied by the appellant as to the depth of sand and gravel existent below the "caliche" and the similarity of the material contained on the Wells Cargo claim and the contested claim does not refute the evidence supplied by the Government. Nor did it establish by a preponderance of the evidence the marketability, including proof of present demand for the particular material located on the claim as of July 23, 1955. To satisfy the requirement that deposits of minerals of widespread occurrence be "marketable" it is not enough that they are only theoretically capable of being sold but it must be shown that the mineral from the particular deposit could have been extracted, sold, and marketed at a profit. United States v. J. R. Osborne, et al., 77 I.D. 83 (1970).

> The "marketability test" requires claims materials to possess value as of the time of their discovery, Location based on speculation that there may at some future date be a market for the discovered material cannot be sustained. What is required is that there be at the time of discovery, a market for the discovered material that is sufficiently profitable to attract the efforts of a person of ordinary prudence. See Barrows v. Hickel, supra; Verrue v. United States, supra.

This the claimant has not demonstrated.

Accordingly we find the appellant's contentions of error to be without substance.

We conclude that the hearing examiner was correct in declaring the claim null and void for lack of a timely discovery of a valuable mineral deposit.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decision appealed from is affirmed.

Douglas E. Henriques
Member

We concur:

Joan B. Thompson
Member

Joseph W. Goss
Member